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MEMO ENDORSED

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Plaintiff Donald Falson is granted leave to amend his complaint to address the purported shortcomings in his complaint. If plaintiff wishes to amend his complaint, he shall do so by June 20, 2008. If he does not amend by that date then, no later than July 11, 2008 defendant may move to dismiss or for a more definite statement. Defendant's time to answer or move is extended to July 11, 2008. So ORDERED
P. Kevin Castel, USDJ
6-3-08

Premotion conference requirement is waived for this motion.

June 2, 2008

VIA FACSIMILE (212) 805-7949
Judge Kevin Castel
U.S. District Court, Southern District of New York
500 Pearl Street
New York, NY 10007

Re: **Donald Falson v. Leonard St., LLC, 08 CV 02192(PKC)(DFE)**

Honorable Sir:

We represent the Defendant in the above referenced action. We write, as per your individual rules, to request leave to move this Court for an order, under Fed. R. Civ. P. 12(b)(6), to dismiss Plaintiffs' complaint in its entirety for failure to state a claim, and for any cause of action not dismissed, an order for a more definite statement under Fed. R. Civ. P. 12(e).

Plaintiff Donald Faison ("Plaintiff") has filed a complaint consisting of three narrative pages annexed to unemployment hearing transcripts consisting of approximately 189 pages.[1&2] Defendant is a restaurant that employed Plaintiff from December 2005 through August 28, 2006 (1/4/07 R43:21-25-R44:2-3; 1/4/07 R43:21-25-R44:2-4).[3] Plaintiff wanted a weekend off from work to attend a "Circuit Assembly of Jehovah's Witnesses." (Compl. at ¶ 7.)[4] Plaintiff alleged the restaurant denied his request because it was short staffed. (Compl. at ¶ 8). On

1 Because Plaintiff included the transcript of his Unemployment Hearings, it should be noted that The Department of Labor, the Unemployment Insurance Administrative Law Judge and The Unemployment Insurance Appeal Board all ruled that Plaintiff quit his job without good cause and therefore, was ineligible to receive unemployment insurance benefits.

2 Defendants will admit the allegations in the Complaint are true only for the purposes of this Motion.

3 The citation (_/_/__ R_:_) refers herein to one of the three transcripts Complainant annexed to his Complaint and the respective page number and lines therein. Because Plaintiff annexed the transcripts to his Complaint, the Court may properly consider the testimony contained in these transcripts as part of this motion. *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Sys., Inc.*, 155 F.3d 59, 67 (2d Cir. 1998).

4 The citation (Compl. at ¶ _) refers to the indicated paragraph contained within Plaintiff's narrative document titled "Complaint For Employment Discrimination."

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August 28, 2006, Plaintiff came into work thirty minutes late. (Compl. at ¶ 11). It is undisputed that upon Plaintiff's arrival, Plaintiff's Supervisor, Chef Josh Eden was aggravated and made statements regarding Plaintiff's lateness and the time off that Plaintiff had requested. (1/4/07 R8:25-R9:6; 1/4/07 R45:5-R57:8). According to Plaintiff, Chef Eden allegedly "yelled," "screamed" and "harassed" Plaintiff. (Comp. at ¶9-11). It is undisputed that in response to Chef Eden's comments, Plaintiff summarily quit and "abandoned" his job. (Comp. at ¶11; 1/4/07 R 9:9-10; 57:8).

Defendant had a policy prohibiting harassment in the workplace which contained a complaint procedure. In December 2005, Plaintiff signed an acknowledgement of receipt of this policy.[5] (R65:24-R66:7). While, there is some dispute in the transcripts annexed to the Complaint as to exactly when Plaintiff became aware of the policy, Plaintiff alleges that he became in possession of the policy in June or July of 2006 and, therefore, it is undisputed that Plaintiff was in possession of the policy prior to his abandoning his job. (5/10/07 R14:2-R15:8). It is also undisputed that Plaintiff took no steps to complain under Defendant's policy until after he abandoned his job. (5/10/07 R15:9-R19:14).

Plaintiff's alleged causes of action are not clear from the Complaint. On his Complaint form, Plaintiff has checked off "Retaliation" and "Other Acts" and wrote in "harassment." Based upon his narrative Complaint, it appears Plaintiff is also suing for constructive discharge. Complaint has not pled "enough facts to state a claim to relief [for harassment, retaliation or constructive discharge] that is plausible on its face." *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007)).

I. Plaintiff Fails to State a Hostile Work Environment or Retaliation Claim

To prevail on a hostile environment claim, the Plaintiff must demonstrate "that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of [his or] her work environment, and that a specific basis exists for imputing the conduct that created the hostile environment to the employer." *Petrosino v. Bell Atlantic*, 385 F.3d 210, 221 (2d Cir. 2004). Plaintiff has not sufficiently pled a hostile work environment or a retaliatory hostile work environment.

First, Plaintiff's "harassment" was not based upon a protected characteristic. "[I]t is axiomatic that mistreatment at work...is actionable under Title VII only when it occurs because of an employee's...protected characteristic." *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir.

5 Defendant's policy and Plaintiff's acknowledgement of receipt of this policy were exhibits to the transcripts Plaintiff annexed to the Complaint and will be submitted to the Court with Defendant's formal motion. Because Plaintiff's Complaint contains these transcripts, which in turn refer to and discuss the exhibits, the Complaint incorporates the transcript exhibits by reference. Therefore, the Court may consider the transcript exhibits in deciding this motion to dismiss. *Automated v. Whellobroor Environmental Sys.*, 155 F.3d at 67.

2001). While Plaintiff's request for time off stemmed from his religion, there is no allegation that his Supervisor's "harassment" had any connection whatsoever to Plaintiff's religious beliefs. To the contrary, the only "harassment" mentioned in the Complaint occurred after Plaintiff arrived at work thirty (30) minutes late and his boss began "yelling." While the Complaint itself is devoid of any allegation as to the reason for the "yelling" and "screaming", the annexed transcripts make it clear that the impetus was Plaintiff's tardiness, not his religion. (1/4/07 R45:5-R57:12; 5/10/07 R5:21-R9:23).

For his claim to survive, Plaintiff must allege that he was treated differently than "similarly situated" persons or he must show disparaging comments or other evidence of discrimination. *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467-468 (2d Cir. 2001). In this case, not only does Plaintiff fail to contrast his treatment to other employees, but he testified, "I always observed him [the Supervisor] screaming at other people..." 1/4/07 R58:25-59:5). There is no reason to believe that these other individuals were of a similar religion as Plaintiff. Accordingly, Plaintiff fails to state a hostile work environment *prima facie* case.

Second, Plaintiff fails to state a hostile work environment or retaliation claim because the unwelcome conduct Plaintiff was allegedly subjected to does not rise to an unlawful level. A claim of hostile work environment harassment requires a showing that the unwelcome conduct Plaintiff was subjected to was sufficiently severe or pervasive to alter the conditions of the Plaintiff's employment and create an abusive work environment. *Mormol v. Costco Wholesale Co.*, 364 F.3d 54, 58 (2d Cir. 2004). Additionally, "in order to establish that a retaliatory hostile work environment is sufficiently severe, a plaintiff must satisfy the same standard applied in hostile work environment claims..." *McWhite v. New York Housing Auth.*, 2008 U.S. Dist. LEXIS 29145, at *39 (E.D.N.Y. April 10, 2008). "A work environment is considered hostile if a reasonable person would have found it to be so and if the plaintiff subjectively so perceived it." *Id.* In determining whether a reasonable person would perceive the environment as hostile, the court looks at whether "the harassment is of such a quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse." *McWhite* at *40. Nonetheless, "incidents that are relatively minor and infrequent will not meet the standard for a discriminatory hostile work environment." *Deters v. Lafuente*, 368 F.3d 185, 189 (2d Cir. 2004). "As a general rule, incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." *McWhite*, 2008 U.S. Dist. LEXIS 29145 at *41.

In light of the standards set forth above, Plaintiff has not pled facts that *plausibly* could lead to the conclusion that he was harassed because of his religion or retaliated against because he attempted to assert his rights. On the face of his Complaint, Plaintiff has pled that on one occasion (August 28, 2008) Chef Josh Eden "yell[ed]" and "scream[ed]" at him. Such allegations do not come close to stating a claim for discrimination. *See, Augustin v. The Yale Club of N.Y. City*, 2008 U.S. App. LEXIS 8775 (2d Cir. April 23, 2008) (upholding a grant of summary judgment to defendant where the allegedly discriminatory events involving episodes of name-calling, inappropriate behavior by a supervisor, and other slights were sporadic). Similarly, Plaintiff's allegations cannot plausibly establish unlawful retaliation because only employer actions that might have dissuaded a reasonable worker from making or supporting a charge of discrimination are actionable. Normally, "[p]etty slights, minor annoyances, and simple lack of good manners' will not deter a worker from making a charge of discrimination." *McWhite*, 2008 U.S. Dist. LEXIS 29145 at *38. In granting summary judgment to a defendant on a Title VII retaliation claim, this Court recently held, "incidents where [defendant] publicly yelled at Plaintiff for various reasons or called him "sh[-]t" ... constitute, as a matter of law, the sorts of petty slights and personality conflicts that are not actionable." *Martinez v. New York City Dep't of Educ.*, 2008 U.S. Dist. LEXIS 41454, at *40 (S.D.N.Y. May 27, 2008).

Lastly, Plaintiff fails to state a hostile work environment claim because he did not set out any basis for imputing the unwelcome conduct to the Defendant; i.e., Plaintiff cannot hold Defendant liable for alleged harassment because an employer can avoid liability for a supervisor's harassment of a subordinate if it (a) exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Plaintiff's Complaint fails under this criterion because his narrative Complaint is devoid of any allegation that the Defendant failed to exercised reasonable care to prevent and correct promptly any harassing behavior or that he took advantage of the corrective opportunities provided to him. *See Quinn v. NYS Office of Temporary and Disabilty Ins.*, 537 F.Supp.2d 427, 431 (N.D.N.Y. 2008) (indicating this is a necessary pleading requirement); *Blanco v. Brogan, et. al.*, 2007 U.S. Dist. LEXIS 86890, at *6 (S.D.N.Y. 2007) (same). More interestingly, however, the transcripts annexed to Plaintiff's Complaint contain lengthy testimony by Plaintiff regarding his receipt of Defendant's anti-harassment policy and Plaintiff's unreasonable failure to avail himself of any of the avenues of complaint Defendant provided. (*See*, 5/10/07 R14:2-R19:14).

II. Plaintiff Fails to State a Claim for Religious Accommodation or Constructive Discharge

To make out a *prima facie* case of religious accommodation discrimination, an employee must show that he (a) held "a bona fide religious belief conflicting with an employment requirement," (b) informed his employer of this belief, and (c) was "disciplined for failure to comply with the conflicting employment requirement." *Baker v. Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006). Plaintiff has not alleged that he was disciplined for his failure to comply with the conflicting attendance requirement. Plaintiff quit after his supervisor "yelled" and "screamed" at him for being late. Accordingly, Plaintiff's own pleading shows that his claim is without merit and, therefore, should be dismissed. *See McLaughlin v. New York City Bd. of Educ.*, 2008 U.S. Dist. LEXIS 4794, at *39-40 (S.D.N.Y. Jan. 22, 2008)("[plaintiff] ha[d] not adduced any evidence that he was disciplined for failing to comply with an employment requirement conflicting with his religion").

To make out a claim for constructive discharge Plaintiff must prove, in part, that the conditions complained of were such that a reasonable person in his position would have been compelled to resign. *Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983). This reasonableness inquiry cannot be satisfied if the employee does not first give the employer an opportunity to remedy the situation. *See Brady v. Wal-Mart Stores, Inc.*, 2005 U.S. Dist. LEXIS 12151, at *16-17 (E.D.N.Y. 2005). As discussed above, Plaintiff did not avail himself of Defendant's complaint procedure.

Finally, in order for the Plaintiff to claim that denial of his leave request caused his constructive discharge, Plaintiff must also plead that the defendant deliberately made Plaintiff's working conditions intolerable with the intent of causing him to resign. The Fourth Circuit, in affirming a district's court's grant of summary judgment to an employer, held that in the absence of evidence that an employer adopted a work schedule for the purpose of causing an employee to resign, no unlawful failure to accommodate religious belief could have occurred. *Johnson v. K-Mart Corp.*, 1997 U.S. App. LEXIS 34000, at *4 (4th Cir. Dec. 2, 1997). Likewise, in this case, Faison has not pled any facts that could plausibly suggest that Defendant denied his leave request for the purpose of inducing him to quit.

III. PLAINTIFF'S COMPLAINT REQUIRES A MORE DEFINITE STATEMENT

Additionally, Defendants wish to move the Court to Order a more definite statement of any remaining claims under Fed. R. Civ. P. 12 (e). Plaintiff appears to bring several causes of action, but it is unclear exactly what he is alleging; e.g., based upon the face of the complaint and the annexed transcripts, a large portion of Plaintiff's Complaint appears to to be borne in the allegation that Plaintiff had some right to the time off because he had worked additional hours in exchange for a promise to the time off. Is Plaintiff alleging a contractual right to the time off? It is not Defendant's responsibility to guess at the Plaintiff's causes of action, and accordingly, Plaintiff should be ordered to submit a more definite statement.

* * *

Thank you for your attention to this matter.

Very truly yours,

Amanda M. Fugazy

cc: Donald Faison (via Federal Express)